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June 16, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW0A325
Washington, D.C. 20554

Electronically Filed

Re: CC Docket No. 95-116; WC Docket No. 09-109

Dear Ms. Dortch:

On June 12, 2014, Leonard Kennedy, Neustar General Counsel, Scott Deutchman, Neustar Deputy General Counsel, Becky Burr, Neustar Deputy General Counsel, Michele Farquhar of Hogan Lovells, Tom Navin of Wiley Rein, and I met with Jonathan Sallet, Michele Ellison, Diane Holland, David Gossette, and Jim Bird of the Office of General Counsel, and Lisa Gelb and Ann Stevens of the Wireline Competition Bureau. This letter provides a record and additional comment on the matters discussed at the meeting.

The meeting included discussion of (i) the June 9, 2014 Public Notice and Second Level Protective Order issued by the Bureau; (ii) open legal issues that may require agency action and caution against proceeding with the June 9 Notice until resolved; (iii) the authority or lack thereof of the Bureau to proceed with the selection of an LNPA based on a purported delegation by the Commission, (iv) the legal requirement for notice-and-comment rulemaking, and (v) equitable and policy arguments that support proceeding by notice-and-comment rulemaking.

In the meeting, Neustar reiterated its position that the Commission is obligated by law and compelled by equitable and policy considerations to act through notice and comment rulemaking in this matter. Neustar expressed its conviction that until the Commission clarifies its position on the nature of this proceeding and attendant procedural requirements, moving forward with the Public Notice and Protective Order would compound the confusion surrounding this process and undermine the soundness of the LNPA selection process. In this regard, Neustar objected to the Protective Order on the grounds that it arbitrarily denies thousands of directly

affected carriers, the bidders, and other stakeholders a meaningful opportunity to participate in the LNPA selection process and cannot produce the record needed to support Commission action in this important matter.

1. The June 9, 2014 Public Notice and Protective Order

Neustar urged the Commission to reconsider its June 9 Public Notice and Second Level Protective Order for several reasons. First, this course of action compounds the confusion that has characterized the RFP process. The Notice invites comment without clarifying important procedural issues that affect how the Commission will ultimately resolve the proceeding. The rules of procedure, process and decision-making remain ill-defined and confusing to many industry participants and the public.

Second, the restrictive terms under which citizen participation is invited defeat the very purpose of public notice and comment. *See Association of Am. Railroads v. Dep't of Transp.*, 38 F.3d 582, 589 (D.C. Cir. 1994) (the purpose of notice and comment is to “afford [] exposure to diverse public comment, fairness to affected parties, and an opportunity to develop evidence in the record”). Neustar described several reasons why the June 9 Notice and Protective Order undermine the purposes for which they were crafted:

- a. Commission staff has designated all matters of consequence – even the Federal Advisory Committee Act Report or Recommendation – as Highly Confidential. That presumption of secrecy over disclosure will frustrate meaningful comment.
- b. Would-be commenters have to “pay to play.” Access is granted only to parties – be they bidders, carriers or members of the public – who retain outside counsel.
- c. All informed discourse is prohibited. Even if counsel is retained, the client cannot seek advice once the record is reviewed by its own lawyer.
- d. The order creates two classes of citizens. The few carriers who sat on the consultative committees of the FACA and the NAPM were not handcuffed in similar fashion and had the freedom to examine the issues “vertically” within their own organizations. The rest who would now like to be similarly informed deserve the same access and equal protection of the law.
- e. The truncated time period provided for comment all but prevents it. To afford interested parties less than 30 days to comment on a record compiled over the course of more than a year, while parties re-submit and re-designate confidential materials, is arbitrary and capricious.

Neustar urged reconsideration. The issue for interested parties, including the many carriers that have not had any previous opportunity to view and comment on the proposals received by the NAPM, is not confined to price, but includes functionality – including the

question whether change is doable without unacceptable risk, cost and groundwork. Barring discussion with counsel and technical consultants who have access to confidential information will frustrate informed judgment on those questions and forfeit the judgment of those who best know the subject.¹

2. Open Legal Issues Requiring Legal Action

Neustar urged postponement of the Notice and Comment for the additional reason that the answers to still unresolved questions of law would enhance informed and meaningful comment. Those questions included: whether notice and comment rulemaking is required, whether the Bureau may make the selection decision on delegated authority, and what process will be employed to resolve questions of vendor neutrality.

3. The Legal Requirement for Notice-and-Comment Rulemaking by the Full Commission

Neustar presented the answers to those questions and reaffirmed the legal arguments set forth in letters of April 14, 2014, April 23, 2014, May 6, 2014 and May 16, 2014 filed with the Commission.

- a. That the Commission has not delegated the power to select and designate the LNPA to the Bureau.
- b. That the selection of a neutral numbering administrator is a Commission responsibility that is not within the authority of the Bureau under the Commission's rules. 47 CFR §0.291.
- c. That the Commission is required by law to conduct a rulemaking in connection with the designation and selection of the next LNPA:
 - (i) The Supreme Court of the United States has said that "[s]ection 251(e), which provides that 'the Commission shall create or designate one or more impartial entities to administer telecommunications numbering,' *requires* the Commission to exercise its *rulemaking* authority" *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 383 n.9 (1999) (second emphasis added).
 - (ii) In an informed and thoughtful manner consistent with the Court's subsequent judgment, the Commission proceeded by way of notice-and-comment rule-making in 1997 for the initial designation of the LNPA.
 - (iii) The Rule adopted in 1997 incorporated by reference a clear statement that equipment manufacturers are barred from serving as

¹ Commission staff indicated a willingness to further discuss the scope of the Protective Order.

LNPA because of concerns about undue influence and bias. See 47 CFR § 52.26 & Section 4.2.2 of the 1997 SWG Report incorporated by reference in the Rule.

- (iv) What is done by rule, can only be undone by rule. 1 CFR § 51.11(a); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34–35 (D.C. Cir. 2005); *see also Sprint Corp v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

4. Equitable and Policy Arguments that Support Notice-and-Comment Rulemaking

Although the Commission is legally required to proceed by rule-making, Neustar also explained that there are independent and compelling reasons to proceed by notice of proposed rule-making (NPRM). First, a notice of proposed rule-making would bring to bear well defined rules and practice to a proceeding that has been ad hoc and conducted almost entirely in secret. Second, it provides the most effective notice and thus will elicit the most informed comment. Third, it would facilitate Commission examination of the irregularities which have dogged the selection process:

- a. The April 2013 decision to extend the time period for bidding to accommodate Ericsson;
- b. The refusal to solicit additional bids from all bidders following Neustar's October 2013 request despite NAPM action giving all bidders reason to believe otherwise;
- c. The succession of apparent leaks to the Capitol Forum with information conveyed in material market-moving ways;² and

² *See, e.g.,* The Capitol Forum, *LNPA Contract: Source Close to Selection Indicates Telcordia Likely to Win LNPA Contract Outright; Neustar Broadens Strategy to Lobby Congress* (March 19, 2014); The Capitol Forum, *LNPA Contract, NANC to Discuss Procurement at Quarterly Meeting; FCC Confident in its Contract Decision in Anticipation of Legal Challenge by Neustar* (March 26, 2014); The Capitol Forum, *LNPA Contract: Source Indicates Telcordia Won NANC Vote Last Week; A Look at FCC Procedural Options Before Final Decision* (April 3, 2014); The Capitol Forum, *LNPA Contract: FCC Likely to Move Ahead with Notice and Comment on NANC Recommendation; Former NANC Member Describes FCC as "Pretty Deferential" to Experts; Telcordia Remains Heavy Favorite to Win* (April 11, 2014); The Capitol Forum, *LNPA Contract: FCC Now Leaning More Toward Awarding Contract Without Notice and Comment; FCC May Hold Private Meetings on Process with Bidders; Timing Uncertain as May 6 Target Date Not Binding* (Apr. 30, 2014); The Capitol Forum, *LNPA Contract: FCC Preparing to Move Ahead with Issuance of Public Notice; Expected Time-frame for Official Contract Award Announcement Now Late Summer or Early Fall* (May 20, 2014); and The Capitol Forum, *LNPA Contract: Major Telecom Trade Groups CTIA, NCTA and USTelecom Submit FCC Filing Urging Prompt Vendor Selection; Letter Emphasizes Adequacy of RFP Process and Importance of Price Reduction* (June 6, 2014).

- d. The unauthorized disclosure of the NANC's recommendation in the FCC docket on Friday, June 6, 2014.

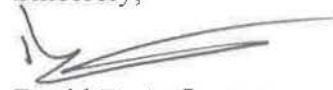
Staff asked what prompted Neustar's letter submission of October 21, 2013. Neustar responded that (i) based on revisions to the RFP, past NAPM practice and consultation with a relevant expert, it always expected several rounds of bidding, and (ii) as the November 14 scheduled date for FoNPAC recommendations approached, Neustar decided to call for further rounds of bidding with the October 21 submission.³ In November 2013, the NAPM appeared ready to seek additional bids.⁴ The NAPM informed Neustar of its apparent reversal in a letter dated January 24, 2014. Because the NAPM without explanation did not seek additional bidding, the NANC did not evaluate, and the industry was not given the opportunity to consider final bids from all parties.

Staff asked if Neustar's October 21, 2013 letter submission was the product of access to source selection data and alluded to the fact that the question was prompted by Ericsson filings. Neustar responded that the suspicion was unfounded and incorrect.

Neustar closed the meeting by urging that all of the carriers are required to deal with a Commission-designated vendor providing a core functionality of the nation's telecommunication system and thus deserve and need to understand fully that choice. A reformed bidding process or a notice-and-comment rule-making could be used as the vehicle to make the industry fully aware of its available choices between Ericsson (with neutrality and transition risk) versus Neustar (at rates substantially less than current price levels).

Pursuant to Section 1.1206 of the Commission's rules, 47 CFR § 1.1206, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact me.

Sincerely,



David D. Aufhauser

cc: Julie Veach
Jonathan Sallet
Phillip Verveer
Lisa Gelb
Randy Clarke
Ann Stevens
Sanford Williams

³ See also Letter from Aaron Panner to Marlene H. Dortch, CC Docket No. 95-116, WC Docket 07-149, WC Docket No. 09-109 (Jan. 29, 2014).

⁴ Commission staff requested copies of the evidence regarding NAPM's November 2013 actions. The evidence has been filed with the Commission under seal in light of NAPM non-disclosure covenants.

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